Office Supreme Court, U.S.
FILED
JUL 7 1951
CHARLES ELMORE CROPLEY
CLERK

No. 178

IN THE

Supreme Court of the United States

October Term, 1951

UEBERSEE FINANZ-KORPORATION, A. G., *Petitioner*,

against

J. HOWARD MCGRATH, Attorney General and as successor to the Alien Property Custodian, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

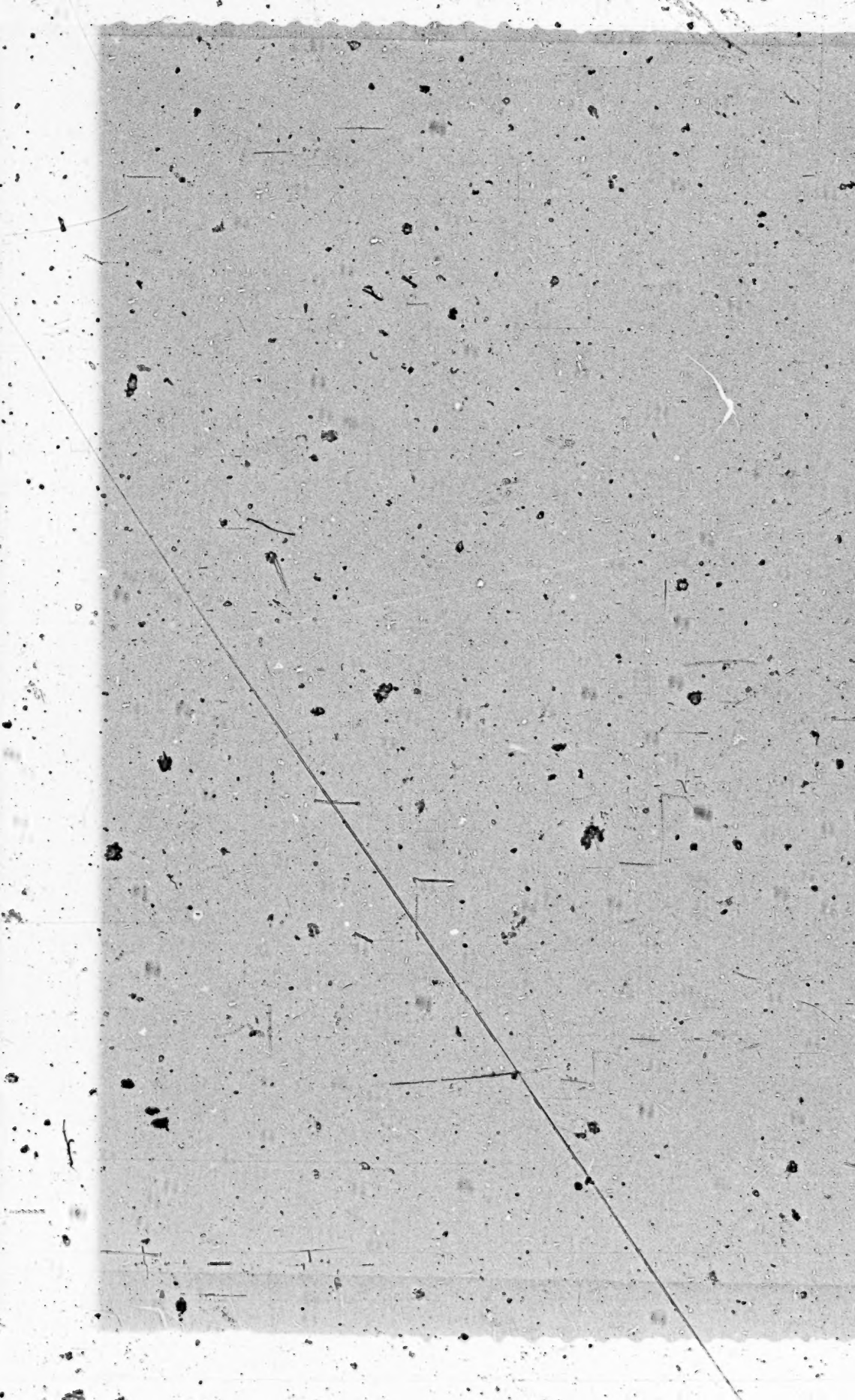
ARNOLD, FORTAS & PORTER,
Ring Building, Washington, D. C.,

GALLAGHER, OSHERMAN, CONNOR & BUTLER,
Bowen Building, Washington, D. C.,

EDWARD J. ENNIS,
165 Broadway, New York, N. Y.,
Attorneys for Petitioner.

THURMAN ARNOLD,
EDWARD J. ENNIS,
HARRY M. PLOTKIN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

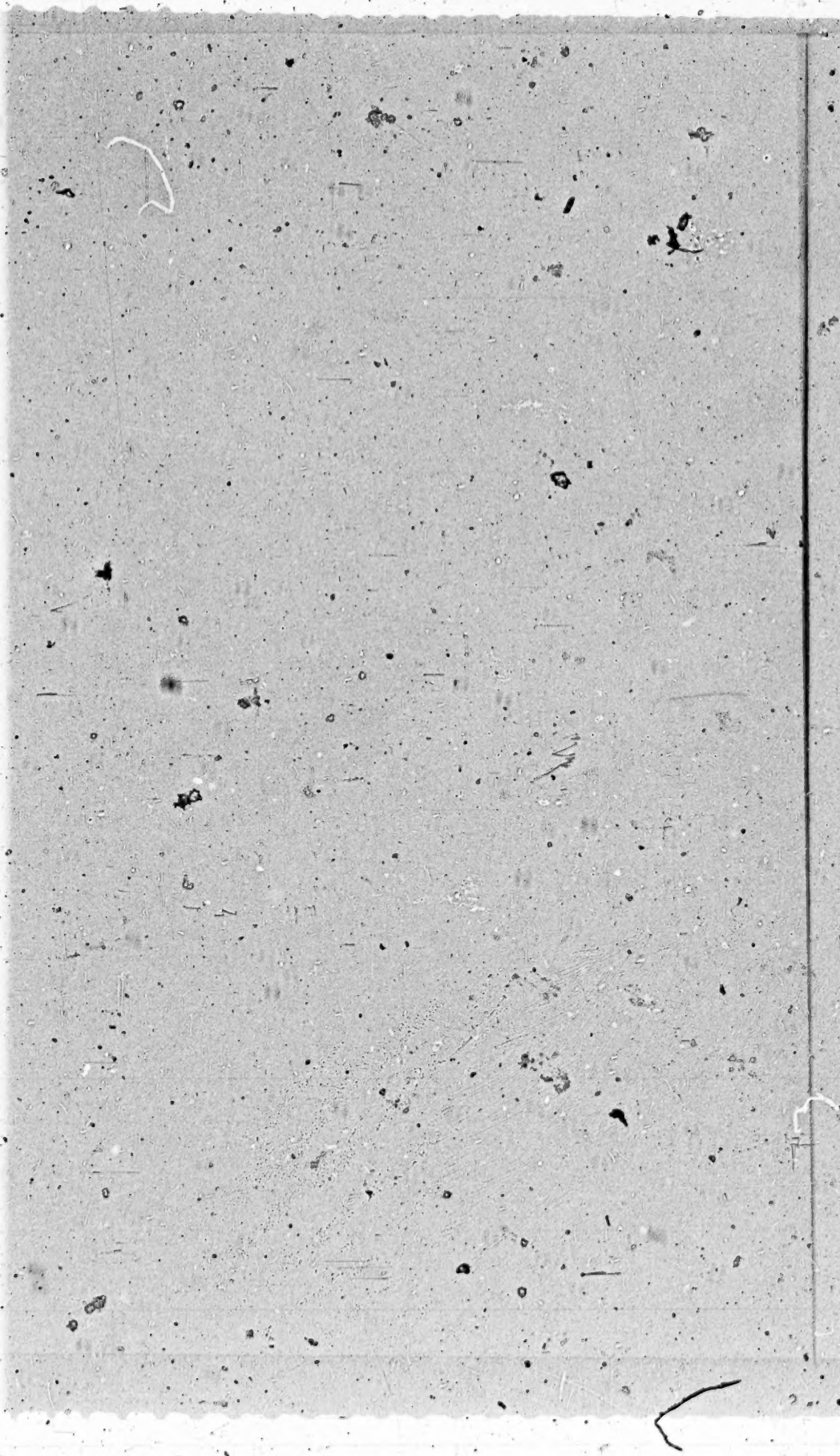
	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	9
Reasons for granting the writ	11
Conclusion	17
Appendix	18

CITATIONS

CASES:

Behn, Meyer & Co. v. *Miller*, 266 U. S. 457, 45 S. Ct. 165 13

Clark v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 68 S. Ct. 174 ..... 5, 11



IN THE

Supreme Court of the United States

October Term, 1951

UEBERSEE FINANZ-KORPORATION, A. G., *Petitioner*,

against

J. HOWARD MCGRATH, Attorney General and as successor to the Alien Property Custodian, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Uebersee Finanz-Korporation, A. G., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on February 8, 1951, affirming the judgment of the District Court of the United States for the District of Columbia rendered for the respondent and an order denying petitioner's Motions for a new trial in an action instituted pursuant to the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411) as amended, to recover shares in domestic corporations owned by petitioner, a Swiss corporation, and vested by respondent and his predecessors as Alien Property Custodian. A "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court" was entered on June 22, 1951, and on June 27, 1951, the Court below en-

tered an order denying Petition for Rehearing or Modification of Judgment.

OPINION BELOW.

The opinion of the District Court (R. 41) is reported in 82 F. Supp. 602. The first opinion of the Court below, Circuit Judge Clark dissenting without an opinion, (R. 2326) and the second opinion of the Court "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court", Circuit Judge Clark not participating (R. 2333), have not yet been reported.

JURISDICTION.

The judgment of the Court below was entered on February 8, 1951. On February 16, 1951, petitioner filed a "Motion for Clarification, Rehearing or Modification of Judgment." On June 22, 1951, the Court below filed a "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court". On June 27, 1951, the Court below entered an order denying the Petition for Rehearing or Modification of Judgment.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether a usufruct in the stock of a neutral corporation under which an enemy had during his lifetime the right to 80% of the dividends and the limited rights, if any, to vote the stock to protect the dividends constitutes such ownership or enemy taint that the Alien Property Custodian may retain the American property of that neutral corporation in a situation where the enemy never exer-

*On May 7, 1951, petitioner filed with this Court an Application for Extension of Time within which to File Petition for Writ of Certiorari since it was not clear what action the Court below would take with respect to petitioner's "Motion for Clarification, Rehearing or Modification of Judgment." By order, dated May 8, 1951, an extension of time for filing was granted until July 8, 1951. In view of the action of the Court below granting the petitioner's Motion to Clarify the Opinion, and denying the Petition for Rehearing or Modification of Judgment, the ambiguity has been removed and the time for filing the petition runs from the date of the last order above.

cised either his right to collect dividends or attempted to vote the stock and where legal title to the shares, and all other rights in those shares (except those covered by the usufruct) were owned by neutrals.

2. Assuming that the Alien Property Custodian is not required to return any indirect beneficial interest in the property given to the enemy by the usufruct, may he retain in addition to such enemy interest the rights and beneficial interests of a neutral. In other words, should not the Custodian's right of confiscation of American property of a neutral corporation be limited to the confiscation of interests held directly or indirectly by an enemy?

STATUTES INVOLVED.

The relevant portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix.

STATEMENT.

Petitioner, Uebersee Finanz-Korporation, A. G., (herein called "Uebersee"), is a corporation organized under the laws of Switzerland. Sometime prior to 1936 it purchased a majority of the stock in two American corporations—about 345,760 out of 625,000 shares in Harvard Brewing Company, a Delaware Corporation, which owned the Harvard Brewing Company (a Massachusetts corporation) and 73,039 out of 140,000 shares in Spur Distributing Company, Inc., which sells gasoline to the public through filling stations. These shares were held by Uebersee continuously until 1942 when they were vested by the Alien Property Custodian, respondent's predecessor in this case (R. 2, 3, 2240).

Virtually all of the stock in Uebersee is held by Fritz von Opel, a citizen and resident of Germany from birth until December, 1929. At that time Fritz von Opel left Germany and never returned except for short visits. He lived successively in the United States, Belgium and Switzerland and in 1934 he became a Swiss domiciliary. On Novem-

ber 21, 1939, he was naturalized as a citizen of Liechtenstein. The record shows that he has been in the United States since May, 1940, and since 1939 he has not been in Germany at all (R. 52, 53).

The facts and circumstances surrounding Fritz von Opel's acquisition of his interest in Uebersee are necessary for an understanding of the issues in this case. In 1931, Wilhelm and Marta von Opel, Fritz' parents, executed an instrument giving to Fritz 600 shares in Adam Opel, A. G., a German corporation. All provisions of the gift instrument were made applicable to any property received as a result of a sale or exchange of the above shares. The property involved in this suit was purchased with the proceeds of the sale of this stock. The instrument of gift contained the following clause: (R. 1806)

> The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20% of all dividends and interest received will accrue to Fritz von Opel.

The instrument further provided that in the event that Fritz should predecease his parents without leaving legitimate issue the gift would become void and the property would revert to the parents or surviving parent. If the parents should predecease Fritz, the gift would be considered as an advancement and be deducted from Fritz' share in the property otherwise inheritable by him from his parents. It further provided that "in the event that the parents shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct" such income should also be accounted for by Fritz as an advancement (R. 1807).

The record is clear as to the nature of rights under German law created by a usufruct, except for voting rights.

The District Court's finding is that a usufruct creates the right (R. 60-61):

> (a) to the enjoyment of the property or, in the case of money or securities, to the income from the securities;
>
> (b) to co-possession of the property together with the person holding legal title to the property;
>
> (c) to a voice in the management of the property insofar as the maintenance and preservation of the usufructary's rights under sub-section (a) above are concerned;
>
> (d) to prevent the sale or disposition of the property as a result of his right to co-possession;
>
> (e) The German Civil Code does not mention whether the usufructary, for the protection of his income, has any voting rights. In the absence of a decided case the legal commentaries speculate in three different directions. One position is that the title owner has all voting rights and the usufructary no voting rights whatsoever. The second position is that the title owner has a voting right for all measures which have nothing to do with income while the usufructary can vote in regard to income. The third position is that the usufructary has all the voting rights.

The District Court did not attempt to make a finding resolving the divergent opinions as to the right to vote.

The record is clear that Wilhelm and Marta von Opel never exercised any of the rights which they had on account of the usufruct. They did not request or receive any of the dividends (R. 61), and whether or not they had any voting rights in the stock, the District Court after examining all the evidence did not find that they exercised any such rights.

The District Court found against Uebersee and refused to order a return of any of the property on the ground that the circumstances surrounding the ownership of stock in Uebersee constituted enemy taint within the meaning of this Court's opinion in *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 68 S. Ct. 174, and

hence precluded recovery under the Trading with the Enemy Act.

There were three circumstances upon which the District Court relied to establish enemy taint. The first is the usufructary interest of Wilhelm and Marta von Opel, plus the contingent interest which they or their daughter owned in the stock if Fritz predeceased his parents with no issue. Since Fritz' parents were enemy aliens at the outbreak of war, the above interests, according to the District Court, were sufficient in and of themselves to constitute enemy taint (R. 48).

The second circumstance relied on by the District Court pertains to Fritz von Opel himself. The court stresses the fact that Fritz von Opel was born in Germany and from his birth in 1899 until 1929 lived in that country together with his family, prominent industrialists known not only in Germany but in other parts of the world. He himself achieved wide-spread distinction in sports in Germany and participated in its behalf in international events. The District Court felt that while after 1929 he spent a large part of his time out of Germany, his roots remained firmly in Germany. The Court, however, explicitly found that Fritz von Opel left Germany permanently in 1929 and that since that time he has resided elsewhere and that as early as 1934 he became a domiciliary of Switzerland. The total amount of time he spent in Germany between 1929 and 1939 did not exceed 10% and he spent no time in Germany after 1939 (R. 48-49, 52-53).

The Court also stressed that Fritz von Opel did not obtain new citizenship until November, 1939, after the war had started. At that time he became a naturalized citizen of Liechtenstein. The Court points out that he paid $10,000 to obtain the citizenship and signed certain formal documents. The Court states that he never has been in Liechtenstein more than a few hours at any one time; that his visits have been few and of short duration; that he has never established a place of abode there; that he never took an oath of allegiance there; and that he did not formally renounce citizenship in Germany. Nevertheless,

the Court did conclude that he was a citizen of Liechtenstein and that his status as such citizen was not open to attack in this case. The Court concluded that, while Fritz von Opel is a citizen of a neutral country, between 1939 when he became a citizen of Liechtenstein and 1941 when war was declared by the United States, he had a continued interest in the welfare of and sympathy for Germany; the Court in its opinion did not even intimate that such was the case after war was declared (R. 48-49).

The final circumstance relied upon by the District Court to show enemy taint arises from the fact that Uebersee owned complete stock interest in Transdanubia Bauxite, A. G., a Hungarian corporation, which mined bauxite, an essential ingredient in the production of aluminum. The Court found that Transdanubia shipped bauxite to Germany during October, November and December, 1941. The Court did not find that any bauxite was shipped after that date although the company had a contract to ship bauxite to Germany through 1942. On the contrary, the Court specifically found that in the spring of 1941, Fritz von Opel refused requests from the officers of Transdanubia for additional funds in order that mining operations could be continued; he suggested that the mines be sold or leased. The Court apparently felt that some enemy taint attached to Uebersee in that it never took any affirmative steps after December 7, 1941 to sever its relations with Transdanubia. The Court admitted, however, that there was no evidence that Uebersee voted the stock in Transdanubia from 1940 through 1945 or that either Uebersee or Fritz von Opel received any income from Transdanubia at any time (R. 49-50, 55-57).

The District Court refused to consider petitioner's contention that even if it were appropriate for respondent to retain any interest which Wilhelm and Marta von Opel had in the stock, Fritz von Opel had a well-defined separate interest which he was entitled to recover. The Court stated that this question was not presented by the pleadings and hence could not be passed upon (R. 50-51).

On February 8, 1951, the Court below, with one Judge dissenting, affirmed the judgment of the District Court. It held that the usufruct is a right *in rem* which includes a right to the dividends. This usufruct was owned apart from the title to the shares themselves by German nationals. Hence, according to the Court below, "this case does not involve a diluted 'taint'; it involves the ownership by enemy nationals of the economic benefits of American business. This seems to us to be a more obvious objective of the vesting provisions of the statute than is the bare ownership of a sterile legal title." (R. 2327).

On February 16, 1951, petitioner filed a "Motion for Clarification, Rehearing or Modification of Judgment" (R. 2329). Three points were made in the Motion. The first point inquired whether the Court was of the opinion that the right *in rem* which Wilhelm and Marta von Opel held in Uebersee by virtue of the usufruct also created a right *in rem* in stock of American corporation held in Uebersee's treasury. The District Court had held against Uebersee on the theory that it was tainted. The Court below did not adopt this reasoning but instead seemed to rely on the "ownership of the right to the dividends"—a right *in rem* which respondent could vest.

In the Court's Memorandum issued on June 22, 1951, the Court addressed itself to this first point and held that whatever ownership petitioner "had in its assets was subject to the usufruct agreement, and the co-possession of the shares of the holding corporation was sufficient to establish the requisite co-possession of its assets". The Court explained that in its view this case did not present a situation of diluted taint but rather an *a fortiori* situation of "ownership by enemy nationals of the economic benefits of American business." (R. 2333-34).

The second point raised by petitioner in its Motion was that assuming the usufruct created a right in enemy nationals, since by its very terms it was a life estate only and conferred rights to receive only 80% of the dividends, on what basis could respondent retain all the rights in the

property—i. e. the right to 20% of the dividends during the lifetime of Wilhelm and Marta von Opel, the voting rights, incident to legal title, and full legal rights after the death of the von Opel parents" (R. 2331). The Court in its Memorandum addressed itself only to the right in Fritz von Opel to receive 20% of the dividends during the period of the usufruct. As to this right the Court dismissed it by calling it a contract right and not one *in rem*. The Court did not attempt to explain what difference it makes whether a right is *in personum* or *in rem*. Nor did it explain why the rights of Wilhelm and Marta von Opel to 80% of the dividends constituted a right *in rem* while the right of Fritz von Opel to 20% of the dividends was not an *in rem* right despite the fact that it was created by the same instrument and Fritz von Opel had co-possession of the shares as much as did his parents. Finally, the Court completely ignored Fritz von Opel's legal title to the stock, his right to vote the stock, and his ultimate remainder interest in the stock (R. 2334).

The third point raised by the Motion requested the Court to modify its judgment so as to award to petitioner the interest in the shares other than the usufruct (R. 2331-32). The Court in its Memorandum treated this request in the same way as the second point and denied it (R. 2334).

The Court's Memorandum was issued on June 22, 1951. On June 27, 1951, the Court below entered a further order denying petitioner's Motion for Rehearing and also its Motion for Modification of Judgment (R. 2336).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the limited usufructuary interest in Uebersee's shares constituted enemy ownership or taint of Uebersee's American assets either within the meaning of this Court's opinion or otherwise within the Trading with the Enemy Act.

2. In holding that the usufructuary right to 80% of the dividends from Uebersee's shares constituted a right to dividends from the shares in American corporations owned by Uebersee.

3. In holding that Uebersee's corporate identity could be virtually destroyed for purpose of treating an alleged enemy usufructuary interest in Uebersee's shares as an enemy usufructuary interest in property owned by Uebersee.

4. In holding that an enemy usufructuary interest in American property of Uebersee, even if such interest existed, was sufficient to warrant confiscation not only of that alleged enemy interest but of all other non-enemy interests in such property.

5. In holding that the neutral Liechtenstein citizen who was Uebersee's sole stockholder merely had a contract right to 20% of the dividends from Uebersee's shares.

6. In holding that a valid usufruct under German law existed in the property in question at the time of vesting.

7. In not holding that the alleged usufruct was insufficient ownership or control of Uebersee to constitute "enemy taint" of Uebersee subjecting its American property to confiscation within the meaning of the Trading With the Enemy Act.

8. In not holding that Uebersee's ownership of a Hungarian subsidiary was no evidence of "enemy taint".

9. In not holding that the circumstances of the acquisition of Liechtenstein citizenship by the owner of Uebersee's shares and his sympathy for Germany prior to the war between the United States and Germany was not evidence of "enemy taint".

10. In not holding that at the most the alleged enemy usufructuary life interest in 80% of the income from Uebersee's shares should be retained and confiscated and the remaining interest should be released to Uebersee or its sole stockholder and in not remanding the case for this purpose.

11. In not granting a new trial to consider additional evidence on the question of waiver of the alleged usufruct.

12. In affirming the District Court.

REASONS FOR GRANTING THE WRIT.

1. This is the second time this case is before this Court. The first time—*Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 68 S. Ct. 174—only the procedural question was presented as to whether petitioner had the right to bring this suit. Because of mutually conflicting statutory provisions this Court had to choose between one section of the statute which appeared to confer a right to prevail simply upon the showing that the suit was brought by a neutral corporation, irrespective of who owned the stock, and another section which seemed to bar recovery if the suit was brought by any foreign person, no matter how friendly or neutral it might be. This Court attempted to give effect to the policies implicit in both sections by adopting an in-between result. It held that foreign persons as a group were not barred from maintaining suits but that in individual cases their right of recovery could be barred if they had an enemy taint.

The Court recognized that this was a compromise solution which was made necessary because of the hasty nature of the legislation in question. The Court explicitly refused to delineate "the extent of holdings necessary to constitute an enemy taint" recognizing the importance of the problems but pointing out that its solution "must await legislative or judicial clarification."

Judicial clarification is urgently needed in this case. The Court below has decided that when a usufructuary interest in a corporation of a neutral country—which interest has not been exercised—is owned by enemy nationals, an *a fortiori* case of enemy taint is presented which results in the confiscation of all the property which such neutral corporation owns in this country plus the interest over and above the usufruct which a neutral stockholder holds in the stock of the foreign corporation.

It is submitted that this constitutes a decision on an important aspect of federal law and that the matter should be settled by this Court. Admittedly, the doctrine of enemy taint is new but the Court below did not even make

a conscientious effort to deal with it. The property in question consisting as it does of shares in a brewing company and a gasoline distributing company is by its very nature incapable of being used in economic warfare against the United States. The usufruct itself is a very limited interest and the record is clear that it was not exercised. Moreover, the usufruct was provided for in an instrument executed long before there was any suggestion of war between Germany and the United States and was created not for the purpose of waging economic warfare against the United States but to make financial provision for Fritz von Opel. Nevertheless, the Court below without even considering these factors concluded that a case of *a fortiori* enemy taint exists simply because a bare usufructuary interest was held by enemy nationals. On the contrary, the interest of enemy nationals is so unimportant and remote that it is difficult to see how any taint at all attaches to Uebersee because of its existence. There is thus no reason at all for respondent to retain any interest in Uebersee, a neutral corporation.

It is important that this question should be settled by this Court as soon as possible. Many other cases are bound to arise which involve the application of the doctrine of enemy taint. As guidance to the courts, this Court should undertake the "judicial clarification" of the doctrine which it enunciated for the first time in the earlier case. If the opinion of the Court below is a fair criterion, it is apparent that there is no real comprehension of the nature of the problem.

A quick settlement of the question by this Court is important for the additional reason that relations with friendly and neutral countries are involved. The property that is involved here is that of a Swiss corporation and of a citizen of Liechtenstein who, according to the record, is a resident of the United States. While the exigencies of war may require extensive powers over the use of property of neutrals, the confiscation of that property should not be lightly countenanced; only the most compelling reasons would justify such a result. Moreover, since American

citizens have extensive investments abroad, we should be careful as to the type of precedents created in this country with respect to confiscation of the property of neutrals which can be used against our citizens in any foreign countries that may happen to go to war. The problem is important enough and urgent enough to require a prompt solution by this Court.

2. Even if this Court is of the opinion that the usufruct of Wilhelm and Marta von Opel was properly vested by respondent and does not have to be returned, there is sound reason for not permitting the judgment of the Court below to stand. The Court below in its "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court" found that the usufruct created a right *in rem* with respect to Uebersee which in turn created a right *in rem* to the property owned by it. The Court did not spell out how it arrived at this result but presumably it did so by piercing the corporate veil and treating directly with the stockholders as though they were the corporation. Under the earlier provisions of the Trading with the Enemy Act, such a result was not permissible, *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, 45 S. Ct. 165, but presumably the Court was of the opinion that it is sanctioned by the 1941 amendments to the Act.

Assuming this to be the case, the Court below went too far. For having pierced the corporate veil for the purpose of getting at the usufruct interest of Wilhelm and Marta von Opel, the Court immediately reestablished the veil between Fritz von Opel and the property owned by Uebersee. This it accomplished by the fiction of calling the right of the parents one *in rem* and that of Fritz a contract right which in the eyes of the Court below precluded any recovery by Fritz.

In the earlier case this Court left for later clarification the question as to "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears". This was a clear indication that this Court contemplated that the entire interest in

property should not be confiscated when it is held partly by a friendly alien and partly by an enemy alien. The Court below nevertheless completely ignored the problem and although the matter was specifically raised and argued, refused to consider any interest other than that of the usufruct.

The reasoning of the Court below cannot stand the test of logic nor does it carry out the policy underlying the 1941 amendments to the Trading with the Enemy Act. Certainly, if an intermediate corporation were not involved, it would not be urged that where fractional interests in American property are held by a friendly alien and an enemy alien, the United States can confiscate the interests of both persons. In such a situation if the United States vested the property, surely it could not successfully retain the interest of the friendly alien. This being so, it is difficult to see how the fact that American property is held by a friendly alien corporation—in which fractional interests are held by a friendly alien and an enemy alien—should cause a different result to be reached. Indeed, until the 1941 amendments to the Trading with the Enemy Act, the interposition of a friendly alien corporation operated to prevent the United States from going behind the corporation at all. If after the 1941 amendment the government can pierce the corporate veil and treat directly with the stockholders as though the corporation did not exist, surely it must do so with all stockholders and not merely some? The effect of the ruling by the Court below is to disregard the corporation so far as enemy alien stockholders of a friendly neutral corporation are concerned but to reestablish the corporate veil so far as friendly alien stockholders are concerned. Such an arbitrary and irrational result cannot be read into the 1941 amendments to the Act. Hence, we have the situation that if the corporation is disregarded, fractional interests by friendly and enemy aliens exist in American corporations. The most the government can do is to retain the interest of the enemy alien. It has no legitimate right to retain the interest of the friendly alien.

The Court below apparently was of the opinion that no fractional interests existed. In part, this reasoning was based upon its recreation of the corporate veil with which we have already dealt. But in some respects its reasoning was based upon a purported distinction between rights *in rem* and contract rights.

It will be recalled that when the usufruct was created, at least three separate rights were created. First, the usufruct retained by Wilhelm and Marta von Opel was by its terms limited to 80% of the income; the remaining 20% was specifically given to Fritz. Secondly, legal title to the stock and voting rights went to Fritz. Finally, Fritz had rights of remainder to the stock after the death of his parents.

The Court below discussed only the first right. As to it, the opinion stated that Fritz von Opel's right to 20% of dividends was a contract right and not a right *in rem*. What significance this formalistic distinction, if true, can have is difficult to understand. The same instrument which created a right to 80% of the dividends in his parents created a 20% right in Fritz von Opel. The co-possession of the stock which the parents needed for the usufruct they shared with Fritz. It is thus difficult to see how the rights of the parents turn out to be *in rem* while those of Fritz are merely contractual. But if such a formalistic distinction does serve some purpose, it can hardly serve the substantive purpose of depriving a friendly alien of property. A firmer basis is necessary for this result than mere formalities of classification.

Even more important than Fritz von Opel's right to 20% of the dividends, are the other two rights mentioned above. These the Court below completely neglects. Surely legal title to stock, voting right in such stock, and the remainder interest in such stock are as much *in rem* rights as a usufruct. Whatever right respondent may have to retain the usufruct, it is difficult to see how it can be extended to the rights of Fritz von Opel, a friendly alien.

The compelling reasons we have discussed above (supra, pp. 12-13) as requiring review by this Court are equally ap-

plicable to this point. An important question of federal law is presented which affects our relations with friendly countries. There are undoubtedly numerous situations where fractional interests in corporations are held by friendly and enemy aliens. Moreover, American business investments abroad are undoubtedly in many instances merely fractional interests and fractional interests in the same business enterprises are held by foreign persons. The decision in the instant case will be a precedent that foreign governments may well apply to these American business interests if any of those countries go to war.

3. There are two matters in the District Court's opinion which were not discussed by the Court below but which will undoubtedly be urged by respondent to support the judgment in its favor. The first point is the intimation that Fritz von Opel had enemy taint. The basis for such a conclusion appears to his German parentage, his residence in Germany for the first 30 years of his life, his participation in international athletic events on behalf of Germany, his getting Liechtenstein citizenship only in 1939, and the feeling of the District Court "that between 1939, when he became a naturalized citizen of Lichtenstein, and 1941, when war was declared by the United States, he had a continued interest in the welfare of any sympathy for Germany." (R. 49).

We do not believe that there is any rational basis on the record for finding enemy taint of Fritz von Opel. There is no dispute that he left Germany permanently in 1929 when he was 30 years old and that his visits to Germany from 1929 to 1939 covered only 10% of the time. While he did not acquire non-German citizenship until 1939, he became a domiciliary of Switzerland as early as 1934. The District Court adverted to no overt act of assistance to the German cause but instead relied on his continued interest from 1939 to 1941 in the welfare of Germany. It is not at all surprising to find an interest in German welfare on the part of someone who was born there. Many American citizens have a genuine interest in the welfare of foreign states

where they or their parents were born. Certainly much more than interest in the welfare of the land of your birth is required to establish enemy taint.

4. The second matter in the District Court's opinion that we desire to comment on is its statement that Uebersee's ownership of stock in Transdanubia Bauxite, A. G. indicated enemy taint. Admittedly, Uebersee continued to own its interests in Transdanubia during the war. But the record is bare of any evidence that Uebersee had anything to do with voting the stock, contributing assistance to or receiving profits from the company during that period. The District Court apparently felt that some sort of enemy taint attached to Uebersee because it did not take affirmative steps to sever its relations with Transdanubia. It certainly is a novel doctrine to suggest that in order to avoid enemy taint a friendly alien must renounce his property which he may own in the enemy country. On the contrary, such renunciation enhancing as it would the economic capacity of the enemy would more accurately be the basis for enemy taint than non-renunciation.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

ARNOLD, FORTAS & PORTER,
Ring Building, Washington, D. C.;

GALLAGHER, OSHERMAN, CONNOR & BUTLER,
Bowen Building, Washington, D. C.;

EDWARD J. ENNIS,
165 Broadway, New York, N. Y.
Attorneys for Petitioner.

THURMAN ARNOLD,
EDWARD J. ENNIS,
HARRY M. PLOTKIN,
Of Counsel.
July, 1951.

APPENDIX.

Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

SEC. 2. The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

* * * * * * * * *

SEC. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * * * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) Investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or pay-

ments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or ear-marking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * * * * * *

SEC. 9 (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, con-

veyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

SEC. 39 [as added by the Act of July 3, 1948, Sec. 12, 62 Stat. 1246]. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946. * * *